FEDERATION REPORTS.

IN RE ESTATE OF O.RM.M.S.M. SEVUGAN CHETTIAR DECEASED.

[Orig. Civ. Juris. (Willan, C.J.) October 26, 1949]

[K.L. — Petition for Probate No. 254 of 1949]

Probate and Administration Enactment, Ss. 6, 16, 24(1), 41, 79 and 87 — Whether probate can be granted to executors who are out of jurisdiction.

In this case the deceased, Sevugan Chettiar, died on the 25th April, 1948, in South India leaving property within the Federation of Malaya. The deceased appointed the two petitioners, Meyappa Chettiar and Arunasalam Chettiar, his sons, executors of his Will. They were both resident in South India, and the point for decision was whether Probate can be granted to an executor who is out of the jurisdiction.

Held, that the two petitioners, though out of the jurisdiction, are entitled to be granted Probate.

Case referred to:-

(1) *In the Goods of Samson* (1873) 3 P. & D. 48.

PETITION FOR PROBATE.

R. Ramani for the Petitioners.

Cur. Adv. Vult.

Willan, C.J. : — The deceased, Sevugan Chettiar, died on the 25th April, 1948, in South India leaving property within the Federation of Malaya. The deceased appointed the two petitioners, Meyappa Chettiar and Arunasalam Chettiar, his sons, executors of his will. They are both resident in South India, and this judgment is to decide whether Probate can be granted to an executor who is out of the jurisdiction.

From my own knowledge I know the general practice in the Malay States has been to refuse to make a grant of Probate to an executor, who is out of the jurisdiction, though there appears to have been isolated cases where this has been done.

Mr. Ramani, for the petitioners, submitted that there is nothing in the Probate and Administration Enactment of the Federated Malay States (Cap. 8) which debars the petitioners from the right to have probate granted to them.

He argued that an executor named in the will has a right to have probate granted to him, whereas the granting of letters of administration is discretionary. He referred me to section 6, the first part of sections 16 and 24(1) and 87 of the Probate and Administration Enactment, which read :—

> "6. Probate can be granted only to an executor appointed by the will.
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> .....
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> 16. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued calling upon the executor to accept or renounce his executorship;.....
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> .....
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> 24. (i) When a deceased has died intestate, administration of his estate may be granted to any person who, according to the Rules for the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.
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> .....
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> 87. Notwithstanding anything hereinbefore contained, it shall be in the discretion of the Court to make an order refusing, for reasons to be recorded by it in writing, to grant any application for letters of administration made under this Enactment."

Contrasting the language in the first two sections with that of the last two sections, I agree with Mr. Ramani's argument.

I can find nothing in the Probate and Administration Enactment which deprives an executor out of the jurisdiction of the right to have probate granted to him unless the Court acts under the provisions of section 54, which reads :—

> 54. (i) When a person has died intestate, or leaving a will of which there is no executor willing or competent to act, or where the executor is, at the time of the death of such person, resident out of the Federated Malay States, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof other than the person who under ordinary circumstances would be entitled to a grant of administration, the Court may in its discretion, having regard to consanguinity, amount of interest, the safety of the estate, and the probability that it will be properly administered, appoint such person as it thinks fit to be administrator.
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> (ii) In every case letters of administration may be limited or not, as the Court thinks fit.

That section is analagous to section 73 of the English Court of Probate Act, 1857, which applied to cases where a testator died before the 1st January, 1926. That section reads :—

> Where a person has died or shall die wholly intestate as to his personal estate, or leaving a will affecting personal estate, but without having appointed an executor thereof willing and competent to take probate, or where the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland, and it shall appear to the Court to be necessary or convenient in any such case, by reason of the insolvency of the estate of the deceased, or other special circumstances, to appoint some person to be administrator of the personal estate of the deceased, or any part of such personal estate other than the person who, if this Act had not been passed, would by law have been entitled to a grant of administration of such personal estate, it shall not be obligatory upon the Court to grant administration of the personal estate of such deceased person to the person who, if this Act had not been passed, would by law have been entitled to a grant thereof, but it shall be lawful for the Court, in its discretion, to appoint such person as the Court shall think fit to be such administrator, upon his giving such security (if any) as the Court shall

direct; and every such administration may be limited as the Court shall think fit.

The case of *In the Goods of Samson*[1] is important. In that case the following passage appears at pages 49 and 50 of the judgment :—

> The seventy-third section does not give me power to refuse probate to any executor appointed by a testator by reason of the badness of his character, but only in certain cases, namely, to such persons as shall be at the time of the testator's death out of the United Kingdom, and therefore beyond the jurisdiction of this Court; and there must be superadded a necessity or convenience that such person should not be allowed to act. The necessity or convenience is further defined as that arising from the insolvency of the estate or other special circumstances. This provision gives me power, where the executor is resident out of the country, if I think he is, by reason of his position there or his bad character, unfitted to act, to exercise a discretion and refuse him an appointment. But it is plain that I must not, merely because the executor is out of the country at the time of the testator's death, lightly set him aside on the ground that some accusation has been brought against him, although in some cases I may do so.

In the case before me there are no reasons why the executors should be set aside; they are both sons of the deceased and there is nothing to suggest they are unfit to be granted probate. Therefore this is not a case which, under section 54 of the Probate and Administration Enactment, I think it is necessary to appoint some other person to administer the deceased's estate. There appears to be no ground that it will be inconvenient if they are appointed.

The only other provisions of the Probate and Administration Enactment (Cap. 8) to which I need refer are sections 41 and 79.

The former section reads :—

> When any executor is absent from the Federated Malay States and there is no executor within the Federated Malay States willing to act, letters of administration with the will annexed may be granted to the attorney of the absent executor, for the use and benefit of his principal, limited until he shall obtain probate or letters of administration to himself.

In my view that is merely an enabling provision; it does not provide that where an executor is absent from the country, administration of the deceased's estate can be granted only to an attorney of the absent executor.

By section 79 the Court may direct, even in granting probate, that the person to whom the grant is made shall give an administration bond. If the Court so directs in any case in which it grants probate to an executor out of the country, that executor would have to come into the country to execute the bond before he could extract his grant of probate. But the Court would only so direct if there are special circumstances — e.g. where the interests of minors have to be protected. In this case there are no special circumstances.

I conclude that the two petitioners, though out of the jurisdiction, are entitled to be granted probate, and accordingly I so order.

Probate Granted.

SARA BINTI HAJI MAT HASSAN v. MARIAM BINTI SAAID.

[Orig. Civ. Juris. (Callow, J.) October 6, 1949]

[Alor Star — Originating Motion No. 29 of 1949]

Land Enactment No. 56, Ss. 85, 85(5), 85(6), 186(5) — Appeal — Extension of time — What are special circumstances for.

This was a motion to extend the time under S. 186(5) of the Land Enactment within which to appeal against an Order of the Settlement Officer, Padang Terap. The facts of the case appear sufficiently in the Judgment below.

Held, that the cause shown for the delay does not constitute special circumstances to render an extension just.

Cases referred to :—

(1) *Jacobson v. Lee*, Weekly Notes dated July 22, 1949, pp. 318, 319.

(2) *Manickam v. Tremelbye (Selangor) Rubber Co., Ltd.* (1949) M.L.J. 90.

(3) *Re Helsby* (1894) 1 Q.B. at p. 746.

ORIGINATING MOTION.

Ismail Khan for the Opposer/Applicant.

Claimant in person.

Cur Adv. Vult.

Callow, J. : — This is a motion to extend the time within which to appeal against an order of the Settlement Officer, Padang Terap, made on the 18th of January, 1949.

The Order was made in accordance with proceedings under section 85 of Enactment No. 56 (Lands), hereafter called the Enactment, and the applicant was the Opposer. By section 85(6) of the Enactment, appeal lies within thirty days; this sub-section has to be considered with section 186 of the Enactment which if certain procedure is followed appears to enlarge the time, for it permits an aggrieved party to seek within thirty days of a decision a certificate of the grounds therefor, and then a further thirty days is granted within which petition may be lodged setting out the grounds of dissatisfaction.